Police Prosecutor Update

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A statute which has not generated much case law is Sexual Misconduct by a Service Provider, IC 35-44-1-5. Recently, an interesting case involving this statute was correctly decided by the Court of Appeals.

The defendant was a civilian employee at a work release center. She became involved with a work release detainee in the facility. On two occasions when the detainee was away from the work release center on an eight-hour pass, and the defendant was off duty, they had consensual sexual relations at a motel.

The defendant conceded she was an employee of the work release center and that she knew she was having sexual intercourse with a detainee of the facility when the acts occurred. However, she claimed that her off-duty conduct with a detainee who was on leave did not violate the law. She specifically claimed that, at the time of the sexual acts, she was not acting as a "service provider," and the detainee was not "subject to detention" at the time within the meaning of the statute. She was incorrect.

The Sexual Misconduct Statute is clearly intended to discourage sexual contact between individuals subject to detention and those entrusted with their care or supervision. It serves the dual purposes of preventing favoritism because of a sexual relationship and preventing retaliation because of that relationship. The Indiana Legislature specifically included a "person employed by a governmental entity" within the definition of "service provider." There is no limiting language, or exclusion of part-time, temporary, or off-duty employees. The defendant did not cease to be employed by a governmental entity when she left the premises. She was thus a "service provider" according to the plain language of the statute.

Furthermore, the Legislature used inclusive language regarding the detainee. The defendant's argument that the detainee in her case was merely in constructive custody rather than actual physical custody fails because the statute does not require that the detainee be "in custody." Rather, the detainee need only be "subject to lawful detention." The detainee in this case was given a temporary pass, whereby he was restricted to the confines of the county and required to return to the work release facility within eight hours. He did not cease to be "subject to detention" when he was given a temporary pass on the condition that he timely return.

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Another recent case dealt with abandonment of property in drug cases. As a general rule, when a suspect discards items from his person as a result of no unlawful police conduct, he will be deemed to have voluntarily abandoned the items.

In the early morning hours, a police officer, in uniform and driving a marked car, observed the defendant and a woman walking away from the porch of an abandoned house with boarded windows. The officer knew it was a high drug crime area with many vacant houses. The officer had received numerous complaints of drug dealing and prostitution in the area. Desiring to stop the pair to investigate, the officer ordered them to stop. The defendant ignored the officer's command and continued walking until he crouched behind a parked vehicle and made a hand gesture "as if he was throwing something." The officer then apprehended the defendant and handcuffed him. He found two bags on the ground near the vehicle which were found to contain drugs.

If property is abandoned after a person is improperly seized, the evidence is not admissible. However, a seizure does not occur if the subject does not yield to a show of authority or an application of physical force. Here the defendant had not been "seized" at the time he tossed the bags, so the drugs were not abandoned as the result of an illegal seizure. Only after he tossed the bags did the officer use force to restrain and handcuff him – to "seize" him.

Case Names: *Hubbard v. State*, 849 N.E.2d 1165 (Ind. Ct. App. 2006)
Gooch v. State, 834 N.E.2d 1052 (Ind. Ct. App. 2006), *trans. denied*.